No. 83-461

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,

In The

Supreme Court of the United States

October Term, 1983

CLUB MEDITERRANEE, S.A., a Foreign Corporation,

Appellant,

vs.

MARJORIE SCHLOSSBERG DORIN and PHILIP DORIN,

Appellees.

On Appeal from the New York Supreme Court, Appellate Division, First Department

MOTION OF APPELLEES TO DISMISS AND APPENDIX

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QUESTIONS PRESENTED

1. Has appellant met its factual burden of demonstrating that the interrogatories at issue require an investigation in French territory, involve obtaining evidence of French nationals on French soil or seek to compel French nationals to submit to New York State discovery procedures in France?

2. Has appellant demonstrated the requisite good faith by seeking a waiver of the application to it of the provisions of Article I bis of the Law of July 16, 1980?

3. Does the Convention On the Taking of Evidence Abroad in Civil or Commercial Matters, 28 U.S.C. §1781, preempt local court rules regarding discovery?

4. Is appellant estopped from asserting the application of the Convention On the Taking of Evidence Abroad in Civil or Commercial Matters, 28 U.S.C. §1781 or asserting an excuse for not answering the subject interrogatories on the grounds of the provisions of Article I bis of the Law of July 16, 1980?

5. Has the appellant properly and timely raised the issues set forth in its jurisdictional statement before the trial court and the Appellate Division, First Department of the New York Supreme Court?

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APPENDIX

Appellant's Motion Pursuant to CPLR §3133 Seeking to Strike Plaintiff's Interrogatories Dated September 14, 1982 . 1a

No. 83-461

In The

Supreme Court of the United States

October Term, 1983

CLUB MEDITERRANEE, S.A., a Foreign Corporation,

Appellant,

vs.

MARJORIE SCHLOSSBERG DORIN and PHILIP DORIN,

Appellees.

On Appeal from the New York Supreme Court, Appellate Division, First Department

MOTION TO DISMISS APPEAL

The appellees, respectfully, move the court under Rule 16 to dismiss this appeal because there is no basis for jurisdiction under 28 U.S.C. §1257(1), 28 U.S.C. §1257(2) or 28 U.S.C. §1257(3); because the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on by the court below; because appellant has failed to factually demonstrate that the evidence sought would require an investigation in French territory or involve obtaining evidence of French nationals on French soil; because the appellant has failed to demonstrate the requisite good faith in seeking to excuse compliance with local court rules based upon the provisions of French "non-disclosure" law; because appellant is estopped from evading local court rules by its vigorous utilization of the very rules it asserts are invalid; and because the appeal is without merit.

STATEMENT OF THE CASE

Prior to December 26, 1982, appellees, residents of the State of New York, purchased from appellant, Club Mediterranee, S.A., and its alter-ego,[1] Club Med, Inc. (hereinafter jointly referred

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1. At p. 6 of its jurisdictional statement appellant asserts that it does not maintain any office in the United States and that the relationship between it and Club Med, Inc. is one of principal and agent. These assertions have not been proven and, in fact, the complaint contains allegations to the contrary.

Paragraph 2 of the complaint states:

> "Upon information and belief, Club Mediterranee, S.A. is a Frence Corporation doing substantial business in New York State through its agent and joint venturer Club Med, Inc. Club Mediterranee, S.A. (hereinafter 'Club Med, S.A.') is in the business of owning, managing, operating and promoting hotels and 'villages', one of which is located in Haiti (hereinafter 'Haiti Village'). Club Med, S.A. is also in the business of promoting, organizing and marketing vacation tours featuring transportation and accommodations at the Haiti Village".

Paragraph 3 of the complaint states:

> "Upon information and belief, Club Med, Inc. is a New York Corporation with offices at 40 West 57th Street, New York, New York and is in the business of organizing, arranging and executing vacation tours featuring accommodations at the hotels and villages owned and managed by Club Med, S.A., to include the Haiti Village".

Paragraph 4 of the complaint states:

> "Upon information and belief, Club Med, Inc. is controlled, managed and operated by Club Med, S.A. for the primary benefit of Club Med, S.A.; Club Med, Inc. and Club Med, S.A. share facilities, management, information and financial resources to such an extent that they constitute a single business entity."

to as "Club Med") a package tour vacation[2] featuring round trip air transportation, seven days accommodations at a Club Med resort facility located in the Republic of Haiti and other services. During their stay at the Club Med facility in Haiti the appellee, Marjorie Schlossberg Dorin, contracted typhoid fever and sustained physical injuries arising therefrom.

The Pleadings

The complaint in this action was served on appellant at the offices of Club Med, Inc. at 40 West 57th Street, New York, New York on February 25, 1982. Thereafter, appellant and Club Med, Inc., in a single pleading, answered the complaint, did not challenge service or jurisdiction, asserted no affirmative defenses and cross claimed against other defendants in the lawsuit.

Club Med's Vigorous Utilization of the CPLR

In accordance with New York State's Civil Practice Law and Rules (hereinafter "CPLR") Club Med vigorously sought discovery of appellees by serving (1) a Demand For A Verified Bill Of Particulars (CPLR §3041), (2) a Demand Pursuant to Section 2103 Of The CPLR, (3) a Demand For Names And Addresses Of Witnesses (CPLR §3101), (4) a Demand For Medical

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2. The package tour vacation in issue was sold by Club Med pursuant to the Special Regulations of the Civil Aeronautics Board (14 *Code of Federal Regulations* §380) [*See Irving Trust Company v. Nationwide Leisure Corporation*, 562 F. Supp. 960, 969 (S.D.N.Y. 1982)]. It is unlikely that appellant can both avail itself of the economic benefits to be derived from operating charter tour programs pursuant to federal regulations and at the same time seek to evade its responsibilities and obligations of appearing in local courts and cooperating with local court rules regarding discovery.

Information And Hospital Authorizations (CPLR §3101) and (5) a Demand For A Statement (CPLR §3101). Thereafter, Club Med moved (CPLR §3042) for sanctions against appellees for their alleged failure to serve a proper verified bill of particulars.

Beyond its vigorous discovery efforts, Club Med utilized the CPLR on behalf of its co-defendant, Societe Generale, in moving to dismiss [CPLR §3211(a)(1) & §3211(a)(7)] the Eighth Cause of Action in the complaint. After this motion was denied, Club Med filed a notice of appeal (CPLR §5515) and filed its appeal on behalf of Societe Generale (CPLR §5530) with the Appellate Division, First Department of the New York Supreme Court for hearing during the September Term, 1983.

Club Med's Vigorous Resistance to Appellees' Utilization of the CPLR

Although more than willing to use the CPLR when it suited its purposes, Club Med has been somewhat reticent in responding to appellees' discovery efforts. On or about September 14, 1982 appellees served on Club Med their first set of interrogatories (Jurisdictional Statement at 97a-101a) pursuant to CPLR §3130. The interrogatories sought information regarding Club Med's resort facility located in the Republic of Haiti. In response, Club Med moved (Appendix p. 1a) for an order vacating the interrogatories on the grounds that "As the annexed Memorandum of Law[3] indicates, the aforesaid interrogatories are barred pursuant

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3. Club Med's memorandum of law before the trial court contained the following points:

Point I — Discovery Proceedings as Issues Herein Are Governed by the Provisions of the Hague Convention.

(Cont'd)

to international law and treaty, French criminal and civil law, as well as the laws of the United States and the New York Civil Practice Law and Rules". Among the arguments presented was one to the effect that the interrogatories violated the procedures set forth in the Convention On the Taking of Evidence Abroad in Civil or Commercial Matters, 28 U.S.C. §1781 (hereinafter "Evidence Convention") (Jurisdictional Statement at 19a-79a). In further support of its position before the trial court Club Med introduced a letter of the French Ministry of Justice (Jurisdictional Statement at 93a-96a) discussing the "two methods of investigation in French territory" and noting the perceived relationship[4] between Article I bis of the Law of July 16, 1980 (Jurisdictional Statement at 88a-92a) and the Evidence Convention. Within the context of its motion before the trial court Club Med did not squarely

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(Cont'd)

Point II — Plaintiff's Interrogatories Are A Nullity as a Result of both Defective Form and Improper Service.

Point III — Request for Documents Cannot Be Used Against French Corporations By United States Plaintiff.

Point IV — Club Mediterranee, S.A. Would Violate French Criminal Law By Answering Interrogatories.

Point V — The Hague Convention Bars Discovery That Is Illegal Under French Law.

Point VI — Plaintiffs Interrogatories Exceed the Permissible Area of Inquiry Under New York State Law.

Point VII — Summary Of Law.

4. *See* Batista, *Confronting Foreign "Blocking" Legislation: A Guide to Securing Disclosure from Non- Resident Parties to American Litigation*, The International Lawyer, Vol. 17, No. 1, pp. 63-69, Winter 1982.

challenge the constitutionality of any provision of the CPLR nor did Club Med factually demonstrate that the interrogatories required an investigation in French territory, or involved obtaining evidence of French nationals on French soil, or purported to compel French nationals to submit to New York discovery procedures in France. As appellees pointed out in opposition to appellant's motion before the trial court, Club Med ". . .has made no showing that the data being sought is available only in France. It probably is available here in New York. . .or in Haiti".[5]

The Trial Court's Order

Relying upon Club Med's presentation and, particularly upon the letter of the French Ministry of Justice, the trial court (Jurisdictional Statement at 5a-6a) did not question either the validity of or the enforceability of the Evidence Convention. The trial court did find, however, that the Evidence Convention was inapplicable because, according to Club Med's presentation, ". . .the Hague Evidence Convention proscribes the taking of evidence by the two methods set forth therein only in French territory. . .". In essence, the trial court found that Club Med had failed to factually demonstrate that the interrogatories required an investigation in French territory, or involved obtaining evidence of French nationals on French soil or purported to compel French nationals to submit to New York discovery procedures in France.

The Appellate Division's Affirmance

Instead of seeking to reargue or renew (CPLR §2221) its motion before the trial court and meet its factual burden, Club

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5. Affidavit In Opposition of Thomas A. Dickerson sworn to November 26, 1982 at p. 14.

Med chose to file a notice of appeal with the Appellate Division, First Department of the New York Supreme Court seeking reversal of the trial court's order. In the subsequent appeal, Club Med, in its brief for defendant-appellant,[6] set forth a single question for consideration;

> "QUESTION PRESENTED
>
> Are the interrogatories propounded by plaintiffs in contravention of and prohibited by the terms of the Hague Evidence Convention?"

On its appeal Club Med did not squarely challenge the constitutionality of any provision of the CPLR. In addition, by limiting itself to the one "Question Presented", Club Med waived consideration by the Appellate Division of those other grounds which it had presented to the trial court, *i.e.*, that the

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6. Club Med's brief for defendant-appellant contained the following points:

Point I — Discovery Proceedings Herein Against Club Mediterranee, S.A. Are Regulated by the Provisions of the Hague Evidence Convention.

Point II — Plaintiff's Interrogatories are a Nullity Pursuant to the Provisions of the Hague Evidence Convention.

Point III — Club Mediterranee, S.A. Would Violate French Criminal Law By Answering Interrogatories.

Point IV — The Hague Evidence Convention Bars Discovery That Is Illegal Under French Law.

Point V — The Court Below, Respectfully, Erred In Its Interpretation and Application Of The Treaty (and Federal Law) in Question.

Point VI — Summary of Law.

interrogatories violate French criminal and civil law. The Appellate Division affirmed the trial court's order without comment (Jurisdictional Statement at 7a-8a).

Club Med's Motion Before The Appellate Division

Instead of seeking to reargue [Rule §600.14(a) of the Appellate Division, First Department, McKinney's New York Rules of Court, 1982 Edition] its position before the Appellate Division and squarely challenge the constitutionality of those provisions of the CPLR which it now seeks to challenge (Jurisdictional Statement at 80a-82a) as well as set forth the other grounds waived on its appeal, Club Med moved [CPLR §5602(b)(1)] before the Appellate Division for leave to file an appeal with the New York Court of Appeals and for certification of three questions of law (Jurisdictional Statement at 106a). The Appellate Division denied[7] Club Med's motion (Jurisdictional Statement at 3a-4a) without comment. Thereafter, Club Med filed a notice of appeal (Jurisdictional Statement at 9a-16a) to this Court and obtained a stay (Jurisdictional Statement at 17a) of further proceedings pending the filing of the instant appeal.

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7. *See* Hopkins, *The Role Of An Intermediate Appellate Court*, 41 Brooklyn Law Review 459, 468-470 (1975).

ARGUMENT

I.

Appellant has failed to factually demonstrate that appellee's interrogatories require an investigation in French territory, involve obtaining evidence of French nationals on French soil or seek to compel French nationals to submit to New York State discovery procedures in France.

The instant lawsuit involves events at a Club Med resort facility located in the Republic of Haiti, a non-signatory to the Evidence Convention. Whether answering the subject interrogatories would involve information located in New York State, in the Republic of Haiti or in France has not been established factually at anytime in the proceedings below. Appellant's assertions at footnote "2." at page "6" of its jurisdictional statement do not rise to the level of factual proof as to what answering the interrogatories would entail. The trial court expressly found that appellant had failed to meet this factual burden.

Cases and articles discussing the application of the Evidence Convention have uniformly dealt with obtaining documents, making physical inspections or deposing witnesses, all of which have been located in a foreign country which is a signatory to the Evidence Convention [*Volkswagenwerk v. Superior Court*, 123 Cal. App. 3d 840, 176 Cal. Rptr. 874 (1981); *Rio Tinto Zinc Corp.*, 1978 A.C. 547, 559 (Great Britian); *Pain v. United Technologies Corp.*, 637 F. 2d 775, 786-790 (D.C. Cir. 1980); Platto, *Taking Evidence Abroad For Use In Civil Cases In the United States—A Practical Guide,* The International Lawyer, Vol. 16, No. 3, pp. 575-585, Summer 1982; Carter, *Existing Rules and Procedures*, The International Lawyer, Vol. 13, No. 5, pp. 5-7, Winter 1979]. This has also been true of cases involving the application for foreign "non-disclosure" laws [*Societe Internationale v. Rodgers,* 357 U.S. 197 (1958); *Arthur Andersen*

v. Finesilver, 546 F. 2d 338 (10th Cir. 1976), *cert. den.* 429 U.S. 1096 (1977); *In Re Oil Spill by Amaco Cadiz,* 93 F.R.D. 840 (N.D. Ill. 1982); *Ghana Supply Commission v. New England Power Company,* 83 F.R.D. 586 (D. Mass. 1979); *Note: Discovery of Documents Located Abroad in U.S. Antitrust Litigation: Recent Developments in the Law Concerning the Foreign Illegality Excuse for Non-Production,* Virginia Journal of International Law, Vol. 14, pp. 747-774 (1974)].

Were the evidence sought located in New York State or in the Republic of Haiti, appellant would be unable to avail itself of either the Evidence Convention or the excuse of non-compliance because of foreign "non-disclosure" law. To the extent the evidence were located in the Republic of Haiti, a non-signatory to the Evidence Convention, the following analysis would apply. Article 11 of the Evidence Convention makes clear that a "privilege or duty to refuse to give the evidence" regarding Letters of Request can only arise "under the law of the State of execution" or "under the law of the State of origin." As for discovery of evidence located in a third country, the legislative history to the Evidence Convention [*see American Society of International Law, International Legal Materials,* Vol. 8, pp. 811-812 (1969)] makes clear that such privileges or duties could not be asserted.

II.

To the extent appellant seeks to excuse itself from answering the interrogatories because of possible sanctions set forth in Article I bis of the Law of July 16, 1980, it has failed to demonstrate the requisite good faith in seeking a waiver of the application of said law.

As to appellant's assertion that it would be subject to criminal

sanctions[8] pursuant to Article I bis of the Law of July 16, 1980, appellant has made no showing that it (1) attempted to seek a waiver of this "non-disclosure" law [*Societe Internationale v. Rodgers,* 357 U.S. 197 (1958); *In Re Westinghouse Electric Corp.,* 563 F. 2d 992 (10th Cir. 1977); *Arthur Andersen v. Finesilver,* 546 F. 2d 338 (10th Cir. 1976), *cert. den.* 429 U.S. 1096 (1977); *Ghana Supply Commission v. New England Power Company,* 83 F.R.D. 586 (D. Mass. 1979)] and (2) upon such a showing been denied a waiver of the subject "non-disclosure" law [*Note: Discovery of Documents Located Abroad in U.S. Antitrust Litigation: Recent Developments in the Law Concerning the Foreign Illegality Excuse for Non-Production,* Virginia Journal of International Law, Vol. 14, pp. 750-751 (1974)] ["The Court made three other strong suggestions in *Societe Internationale* which are often cited. The first is that there is a very substantial requirement of good faith on the part of the party seeking to avoid the consequences of failure to comply with a valid discovery order on grounds of foreign criminal liability. The Court strongly implied a requirement that the party seek a waiver of the prohibiting law from the foreign country. . ."]. The letter introduced by appellant at pp. 93a-96a of the jurisdictional statement was not generated as a result of this lawsuit.

III.

The application of the Evidence Convention to the exclusion of local court rules is discretionary at best.

Appellant asserts that the Evidence Convention supercedes and takes precedence over domestic court rules regarding discovery.

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8. It appears that such sanctions are totally illusory. *See* Batista, *Confronting Foreign "Blocking" Legislation: A Guide to Securing Disclosure from Non-Resident Parties to American Litigation,* The International Lawyer, Vol. 17, No. 1, pp. 63-69, Winter 1982.

Contrary to this assertion, the Evidence Convention does not preempt any procedural rule regarding discovery utilized by the courts of a signatory country and the enforcement of the Evidence Convention to the exclusion of local court rules is within the discretionary powers of local courts.

Article 27 of the Evidence Convention states:

> "The provisions of the present Convention shall not prevent a Contracting State from—
>
> . . . .
>
> (b) permitting by internal law or practice, any act provided for in this Convention to be performed upon less restrictive conditions;
>
> (c) permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention."

The legislative history to the Evidence Convention [*American Society of International Law, International Legal Materials,* Vol. 8, pp. 807-808, 818 (1969)] states that the Evidence Convention shall not preempt local law;

> "While the proposed Convention provides a substantial number of improvements over existing practice, it is important to emphasize that the Convention is designed to set minimum standards for international assistance.
>
> . . . .
>
> "All of this, of course, is subject to the general rule of Article 27 that any more liberal practice

> in any signatory State which permits any act to be performed upon less restrictive conditions, under internal law or practice, remains in full force and effect and is in no way limited by the restrictions or limitations of the Convention."

In *Volkswagenwerk v. Superior Court,* 123 Cal. App. 3d 840, 859, 176 Cal. Rptr. 874 (1981), the California Supreme Court stated:

> "We could perhaps read the Hague Convention broadly, as a preemptive and exclusive rule of international evidence gathering, binding upon us as the supreme law of the land under section 2 of article VI of the federal constitution. But we prefer to believe that the Hague Convention establishes not a fixed rule but rather a minimum measure of international cooperation; our reading of article 27 of the convention encourages us to conclude that this is, indeed, what the ratifying states intend."

Since the application of the Evidence Convention to the exclusion of local court rules is a discretionary matter within the purview of the trial court, the proper approach to considering this issue is a "case-by-case process of balancing the interests of the respective sovereignties to reach an appropriate accommodation of the law of the forum with the concepts of due process and international comity" [*Volkswagenwerk v. Superior Court*, 123 Cal. App. 3d 840, 857, 176 Cal. Rptr. 874 (1981)]. It can not be stated that appellant specifically addressed or even considered this "balancing of interests" approach in its presentation before the trial court or the Appellate Division.

IV.

Appellant is estopped from asserting that appellees must proceed via the Evidence Convention to the exclusion of local court rules and that appellant should be excused from compliance with local court rules on the grounds of foreign non-disclosure law.

Appellant does substantial business in New York State, has not challenged service of the complaint upon it in New York State, has not challenged the jurisdictional power of the New York State Supreme Court, has crossed claimed against other defendants in the lawsuit, has vigorously utilized the CPLR for discovery of the appellees, has vigorously utilized the CPLR seeking to dismiss a cause of action against its co-defendant, Societe Generale, and has vigorously utilized the CPLR seeking to strike some of the interrogatories propounded by appellees (Jurisdictional Statement at 8a). Under these circumstances it is neither fair nor just to permit appellant to evade local court rules regarding discovery.

V.

There is no basis for jurisdiction under 28 U.S.C. §1257(1), 28 U.S.C. §1257(2) or 28 U.S.C. §1257(3).

Appellant asserts that this Court has jurisdiction over this appeal pursuant to 28 U.S.C. §1257(1), 28 U.S.C. §1257(2) and 28 U.S.C. §1257(3). It can not be demonstrated by appellant that it placed before either the trial court or the Appellate Division on its appeal a question concerning "the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States. . ." [*Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434, 440-441 (1978); *Cohen v. California,* 403 U.S. 15, 17-18 (1970); Stern & Gressman, *Supreme Court Practice,* Fifth Edition, §§3.3-3.4]. In appellant's briefs before the trial court and the Appellate Division on its appeal

the appellant did not "make specific and plain . . .[its] contention that the application of the [CPLR] to [its] particular circumstances would make the [CPLR] void under federal law". To the extent such an issue was raised in one of the "Questions" which appellant sought to have certified by Appellate Division (Jurisdictional Statement at 102a-124a) does not cure the fact that it was not presented in a timely manner. Nor can it be stated that either the trial court or the Appellate Division passed on such an issue, assuming it was raised.

CONCLUSION

Wherefore, appellees respectfully submit that the instant appeal should be dismissed by this Court.

Respectfully submitted

THOMAS A. DICKERSON
Attorney for Appellees

APPENDIX — APPELLANT'S MOTION PURSUANT TO CPLR §3133 SEEKING TO STRIKE PLAINTIFF'S INTERROGATORIES DATED SEPTEMBER 14, 1982

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Index No. 4777/82

MARJORIE SCHLOSSBERG DORIN and PHILIP A. DORIN,

Plaintiffs,

-against-

CLUB MEDITERRANEE, S.A., CLUB MED, INC., CELEBRITY TRAVEL SERVICE, INC., KENT TRAVEL SERVICE, INC., SOCIETE GENERALE and NATIONAL UNION FIRE INSURANCE,

Defendants.

A 8A Conference has been held. The conference was adjourned by the Judge to permit the parties to submit papers.

S I R S :

PLEASE TAKE NOTICE, that upon the annexed affirmation in support of the instant motion of defendant, CLUB MEDITERRANEE, S.A. the undersigned will move this Court at Special Term, Part 8A thereof, at the courthouse located at 60 Centre Street, New York, New York, on the 30th day of November, 1982 at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order:

1. Pursuant to CPLR §3133, striking plaintiffs' interrogatories;

2. for such other and further relief as to the Court may seem just and proper.

PLEASE TAKE FURTHER NOTICE, that pursuant to CPLR 2214, answering papers, if any, must be served at least five days before the return of this motion.

Dated: New York, New York
November 22, 1982

Yours, etc.,

KROLL, POMERANTZ &
CAMERON
Attorneys for Defendant
CLUB MEDITERRANEE, S.A.
500 Fifth Avenue
New York, New York 10110
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TO: THOMAS A. DICKERSON, ESQ.
Attorney for Plaintiffs
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New York, New York 10017

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Index No. 4777/82

MARJORIE SCHLOSSERG DORIN and PHILIP A. DORIN,

Plaintiffs,

-against-

CLUB MEDITERRANEE, S.A., et al,

Defendants.

AFFIRMATION

CHRISTOPHER W. CHAN, an attorney duly admitted to practice law before the courts of the State of New York, aware of the penalties for perjury, affirms as follows:

Your affirmant is associated with the law firm of Kroll, Pomerantz & Cameron, attorneys for movant.

Your affirmant submits this affirmation in support of the instant motion for multiple relief.

BASIS OF ACTION

Plaintiffs bring this action against defendant, CLUB MEDITERRANEE, S.A., among others, for injuries allegedly sustained by MARJORIE DORIN at a Club Med resort in the Country of Haiti during the period between December 26, 1981 and January 2, 1982. Defendant, CLUB MEDITERRANEE, S.A., has denied all of the material allegations of the complaint as well as raised various affirmative defenses and cross-claims in its

answer. Copies of the complaint and answer are annexed hereto as Exhibits "A" and "B", respectively.

CLUB MEDITERRANEE, S.A. is a French corporation, duly existing and subject to the laws of the solvent Republic of France.

BASIS FOR MOTION

Plaintiffs have served upon defendant, CLUB MEDITERRANEE, S.A. a set of interrogatories which are annexed hereto as Exhibit "C".

As the annexed Memorandum of Law indicates, the aforesaid interrogatories are barred pursuant to international law and treaty, French criminal and civil law, as well as the laws of the United States and the New York Civil Practice Law and Rules.

The procedure required under the Hague Convention was not even remotely followed here. Plaintiffs sent nothing to the French government, nor did they seek the required assistance from the United States Department of Justice in promulgating and serving proper letters of request upon the French government. They merely drew up their own list of questions and document requests and served them directly upon the undersigned, counsel for CLUB MEDITERRANEE, S.A.

Plaintiffs have not made the slightest effort to comply with the Hague Convention as regards the form and service of the interrogatories. This failure is fatal and plaintiffs' efforts to seek a court order compelling disclosure under a purely unlawful procedure must be denied on this ground alone.

Plaintiffs' interrogatories also are improper under New York law. Plaintiffs are not merely seeking information as to the

operation of the facility which could possibly relate to the alleged contraction of typhoid fever. Rather, they seek to discover obscure details about the construction of the resort, even going so far as requesting, ". . .when consideration was given to the possibility of constructing and operating a Club Med facility in Haiti." Plaintiffs' Interrogatory No. 12. They do not merely seek to obtain information as to possible complaints by guests which might put the defendant on notice of conditions relevant to the issues herein, but they seek, ". . .the name and address of all persons accommodated at the Club Med facility in Haiti during the period when the plaintiffs stayed there." Plaintiffs' Interrogatory No. 8.

WHEREFORE, your affirmant respectfully requests that the Court grant its motion for a protective order and grant such other and further relief as to this Court seems just and proper.

Dated: New York, New York
November 22, 1982

CHRISTOPHER W. CHAN